Supreme Court, U.S.
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85-903
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CERTAIN UNNAMED PROSPECTIVE DEFENDANTS,

Petitioners,

v.

NEWSPAPERS, INC.; WTMJ, INC.; GREEN BAY PRESS GAZETTE; WISN-TV, Division of Hearst Corporation; WISN RADIO and WBTT RADIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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QUESTION PRESENTED

Is the "compelling necessity" standard governing closure of trial and pretrial proceedings also applicable to precharging proceedings and, specifically, is this standard applicable to a hearing conducted by a state judge when the prospective defendants and the prosecutor's office request that the hearing be closed?

PARTIES BELOW

In the Wisconsin Supreme Court, the following parties appeared as petitioners:

Newspapers, Inc.
WTMJ, Inc.
Green Bay Press Gazette
WISN Radio
WBTT Radio
WISN-TV, Division of
the Hearst Corporation

In the Wisconsin Supreme Court, the following parties appeared as respondents:

Certain Unnamed Prospective Defendants
Circuit Court for Milwaukee County, The Honorable
Arlene D. Connors, Circuit Judge, presiding
District Attorney for Milwaukee County
K.M.

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OPINION BELOW

The opinion of the Wisconsin Supreme Court is reported at 124 Wis. 2d 499, 370 N.W.2d 209 (1985). It is reproduced in the Appendix to this petition at App. 1-23.

JURISDICTION

The judgment sought to be reviewed was dated and entered June 26, 1985. Reconsideration was denied by a *per curiam* order entered September 27, 1985. App. 24.

The statutory provision which confers jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1257(3).

STATUTE INVOLVED

Wis. Stat. §968.02(3) (1983-84):

> If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be *ex parte* without the right of cross-examination.

STATEMENT OF THE CASE

On October 9, 1984, two members of the Green Bay Packers professional football team were accused by a dancer from a Milwaukee tavern of having sexually assaulted her. The police were called several hours after the alleged assault, and they began their investigation in the early morning hours of October 10, 1984. For the next week, both the Milwaukee Police Department and the Milwaukee County District Attorney's office conducted an intensive investigation which included, *inter alia*, interviewing the complainant and the two players, all of whom were represented by counsel. Following the investigation,

the District Attorney announced his decision not to issue criminal charges, and representatives of the Milwaukee Police Department publicly stated their agreement with this decision.

On November 26, 1984, the complainant filed a petition in the Milwaukee County Circuit Court seeking a hearing pursuant to Wis. Stat. §968.02(3) (1983-84) to determine whether a criminal complaint should be filed against the two football players. The case was assigned to Circuit Judge Arlene D. Connors who, following meetings with counsel for the complainant and the prospective defendants, representatives of the District Attorney's office, and an attorney appointed special counsel to the judge for the pendency of the proceeding, scheduled a hearing for January 18, 1985.

On January 16, 1985, special counsel to Judge Connors moved for an order determining whether the public should be excluded from the hearing. A hearing was held on this motion on January 17. Attorneys representing the prospective defendants and the District Attorney's Office favored closure, and attorneys representing the media and the complainant opposed closure. On January 17, 1985, Judge Connors issued her decision and order closing the proceedings to the public and the press. App. 43-50. In her ruling, Judge Connors recognized that if charges were issued, the accused, based on the inordinate degree of pretrial publicity involved, would have a difficult time securing an impartial jury in the event they were charged and would suffer unnecessary and embarrassing publicity in the event they were not charged. Judge Connors felt that she had an affirmative constitutional duty to minimize the effect of pre-trial publicity in order to safeguard the unnamed prospective defendants' due process rights. (J. Connors' Dec. at 6-7; App. 46-47.) The media representatives filed

notices of appeal from Judge Connors' order as well as petitions for extraordinary writs before the Wisconsin Court of Appeals which stayed the hearing before Judge Connors. Following full briefing and oral argument, however, the Court of Appeals by unanimous decision affirmed Judge Connors. App. 25-42. The Court of Appeals spent five pages of its opinion discussing the First and Sixth Amendment implications of its decision. Ct. App. 16-20; App. 36-39.

On March 7, 1985, the media representatives obtained from the Wisconsin Supreme Court a stay of proceedings before Judge Connors pending resolution of its pleadings before the Wisconsin Supreme Court. Again, the hearing before Judge Connors was deferred. On June 26, 1985, the Wisconsin Supreme Court, by a four-three vote, granted the media's petition for a supervisory writ and held that the pre-charging proceedings before Judge Connors were to be tested by the same standard applicable to trial proceedings. Thus, the public could be excluded only if the prospective defendants were able to demonstrate a compelling necessity for closure.

On July 15, 1985, counsel for the unnamed prospective defendants timely sought reconsideration which was denied by a *per curiam* order on September 27, 1985. App. 24.

On October 7, 1985, Judge Connors scheduled the hearing to determine whether a complaint should be filed for December 16, 1985.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE WISCONSIN SUPREME COURT RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The prospective defendants in the state court proceedings are well-known professional althletes; their alleged conduct involves sexual contact with a bar dancer. The potential for exploitative titillation was not lost on the media which immediately descended on the case and its participants. Front page headlines and news bulletins were the hallmarks of "The Packer Case" from its inception.*

Judge Connors, an experienced and respected state trial judge, recognized the likelihood of jury taint from this publicity, and she focused on that problem as one of her reasons for closing the proceeding to the public. App. 48. If Judge Connors' decision is tested against the "reasonable likelihood of substantial prejudice" standard utilized in *Press-Enterprise Co. v. Superior Court*, 37 Cal. 3d 772, 209 Cal. Rptr. 360, 691 P.2d 1026 (1984), *cert. granted*,

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* One of the dissenters in the Wisconsin Supreme Court, Justice Bablitch, noted:

> That the accusations of the accuser, be they true or false, libelous or not, will be reported statewide in excruciating detail in all the media, cannot be denied. This case has already generated intense media interest. It has all the ingredients of a Sidney Sheldon best-seller: Sex, booze, an exotic-dancer, professional football players. The reporting of the accuser's allegations will not just be confined to the immediate area of the offense; it will be statewide.

370 N.W.2d at 220-221.

54 U.S.L.W. 3244 (October 15, 1985), it seems clear that the closure order would be upheld.

However, the "reasonable likelihood" test has not been applied; instead, a one-justice majority of the Wisconsin Supreme Court applied the "compelling necessity" test, deciding that pre-charging proceedings should be analyzed within the same constitutional framework utilized for trials and pre-trial settings such as those involved in *Press-Enterprise Company v. Superior Court*, 104 S.Ct. 819 (1984), and *Waller v. Georgia*, 104 S.Ct. 2210 (1984).

In *Press-Enterprise*, the Court held that the guarantees of open public proceedings in criminal trials are applicable to the voir dire examination of potential jurors. In *Waller v. Georgia*, the Court held that a defendant's Sixth Amendment right to a public trial applies to a suppression hearing. In both cases, the Court required that the party seeking closure advance an overriding interest likely to be prejudiced by an open proceeding.

This case, by contrast, involves neither a trial nor a pre-trial proceeding. Instead, the hearing at issue is *ex parte*, Wis. Stat. §968.02(3) (1983-84); it is not a "sitting of a court," *State ex rel. Newspapers, Inc. v. Circuit Court*, 124 Wis. 2d 499, 370 N.W.2d 209, 213 (1985); and it is conducted before a judge who, after hearing testimony unconfronted and unfettered by the rules of evidence, will decide whether to issue criminal charges.

Similar proceedings are routinely and historically closed to the public. Grand jury proceedings, search warrant applications, arrest warrant applications and wiretap applications are all conducted in secret, and there seems to be no legitimate question about the propriety of secrecy in these circumstances. *See, e.g., Levine v. United States*, 362

U.S. 610, 617 (1960). Prosecutors' charging conferences are traditionally conducted in private,* and petitioners are aware of no decisions critical of this practice.

Because this case does not involve either a trial or a pre-trial proceeding, there is no established right of public access. In the absence of such a right, there should be no requirement that one seeking closure demonstrate a compelling necessity. Instead, the standard utilized by the California Supreme Court in *Press-Enterprise*, which this Court recently accepted for certiorari, should control: Closure should be allowed whenever a reasonable likelihood of substantial prejudice exists as a consequence of open proceedings.

CONCLUSION

This Court has repeatedly provided guidance to the state and federal courts in their efforts to accommodate the public's First Amendment interests while simultaneously protecting defendants' fair trial interests. The instant case will allow the Court to draw a bright-line distinction between charged cases and investigative proceedings. It provides an ideal companion case to the *Press-*

* In this case, for example, both the Milwaukee County District Attorney's office and the Wisconsin Attorney General's office opposed opening the pre-charging proceedings before Judge Connors to the public.

Enterprise litigation accepted by this Court within the last month.

Certiorari should be granted.

Dated: November 22, 1985

Respectfully submitted,

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APPENDIX 1

STATE of Wisconsin ex rel. NEWSPAPERS, INC., WTMJ, Inc., Green Bay Press Gazette, WISN-TV, Division of Hearst Corporation, WISN Radio and WBTT Radio, Petitioners,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY, the Honorable Arlene D. Connors, presiding, Certain Unnamed Prospective Defendants, District Attorney for Milwaukee County and K.M., Respondents.

No. 85-0461-W.

Supreme Court of Wisconsin.

Argued April 30, 1985.
Decided June 26, 1985.

Bablitch, J., dissented and filed an opinion.

HEFFERNAN, *Chief Justice.*

Petitioners, various media organizations, have requested the issuance of a supervisory writ, pursuant to sections 809.51 and 809.71, Stats.[1], commanding the circuit court for Milwaukee county, the Honorable Arlene D. Connors, presiding, to conduct in public a section 968.02(3), proceeding pending before her, entitled *In Re Petition of K.M.*, criminal division case no. L-002-C. We hold that such proceedings are to be presumptively open to the public and may be closed only upon a showing of a substan-

[1] Pursuant to the procedures in section 809.51(2), we did not deny the petition *ex parte*, but ordered written responses and oral argument.

tial, compelling reason to do so. The judge in the instant case could not in the proper exercise of her discretion conclude that there was such a compelling reason. Therefore we grant this petition for a supervisory writ.

This matter concerns an alleged sexual assault by two professional football players (defendants) upon a female dancer (complainant) in the dressing room of a Milwaukee nightclub. It is sufficient here to note only that this incident has received substantial attention in the state media and the versions of the incident by each of the alleged participants vary. The defendants, who have not been identified by some of the state's media, claim the incident was consensual as demonstrated by the conduct of the complainant. She asserts there was no consent.

After investigation of the incident, the Milwaukee County District Attorney refused to issue a criminal complaint, not on the basis of a lack of probable cause but upon his perceived inability to prove guilt at trial. He stated publicly:

> "After carefully considering all elements of this case, we have determined that the state will be unable to prove the guilt of the two men beyond a reasonable doubt. To file charges of third-degree sexual assault when we believe that a jury will find the men not guilty would not be in the interests of justice. A lengthy, bruising trial with consent as a defense ending with a not guilty verdict is not in the best interests of the young woman.
>
> "This decision is not an expression of belief that the young woman gave consent. It is a statement, again, that on the evidence that would be presented to the jury, we will not be able to convince a jury beyond a reasonable doubt that consent was not given. We believe there was indecent and immoral sexual overreaching by the two men. We believe the conduct of the two men to be reprehensible, shameful and depraved. We believe that their status as professional football players had a role in psychologically exploiting the young woman."

The district attorney's proceedings throughout his investigation were not open to the public.

The complainant then petitioned the Milwaukee County Circuit Court to assign a judge to issue a complaint under section 968.02(3):

> "If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds that there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be *ex parte* without the right of cross-examination."

The matter was assigned to Judge Connors.

She initially indicated she would take testimony from various witnesses under oath in the presence of the court reporter, clerk, counsel, complainant, defendants and the public. However, upon objection by the defendants and after a hearing at which counsel for the media, complainant, defendants and the state were permitted to argue, Judge Connors reconsidered her decision.

The judge ruled that the proceeding did not involve the "sitting of a court" and thus did not have to be open under section 757.14, Stats.:

> "The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise provided by law on the examination of persons charged with crimes; provided, that when in any case a cause of a scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the court is sitting all minors not necessarily present as parties or witnesses."

She held that this matter was only in the accusatory stage, no criminal complaint had been issued, and thus the proceeding was exempt from the statute. She also concluded that under *Bloomer v. Bloomer*, 197 Wis. 140, 221

N.W. 734 (1928), a judge has the discretion to close a courtroom to the public in the interest of justice where, under proper and compelling circumstances, salacious evidence may be presented. Judge Connors stated that under her "inherent power" to close proceedings, and because of the existence of "compelling" circumstances in this particular case, the hearing should be closed. Those circumstances Judge Connors stated were the following:

> "1. Although complainant had asked for an open hearing, she did not realize the 'traumatic effect' that an open hearing would have on her testimony, and she and her family should not be subjected to such an 'ordeal.'
>
> "2. Witnesses might be inhibited by the public's presence, thereby impeding the search for truth.
>
> "3. The overall 'salacious, obscene testimony' that would be presented could be offensive to the public.
>
> "4. If charges were eventually issued, the likely inordinate degree of pretrial publicity would make it difficult to impanel an impartial jury.
>
> "5. This was only an accusatory hearing and even if no charges were eventually issued, revelation of the details of the incident to the public would cause defendants 'unnecessary agony or suffering.' "

Judge Connors also found that there were no reasonable alternatives to a closed hearing and added that her ultimate decision on the issuance of charges would be rendered in open court.

Petitioners then asked the court of appeals to issue a supervisory writ requiring the proceedings to be open. In an opinion reported at ____ Wis.2d ____, ____ N.W.2d

____ (Ct.App.1985), the court denied this request.[2] Despite a tradition of open court proceedings, the court concluded for several reasons that a section 968.02(3) proceeding did not presumptively have to be open to the public. Primarily, the statute itself did not expressly require openness nor did the function of the proceeding—basically a check on the district attorney's decision not to issue a complaint—constitute the sitting of a court. Accordingly, closure did not have to be justified by a "strict standard" requiring the existence of a "compelling" reason. Rather, it was within the judge's discretion to close and in this particular case that discretion was not abused. There was a "reasonable possibility" that an open hearing would result in the problems Judge Connors contemplated.

Resolution of this petition calls for us to resolve several issues.[3] First, is a section 968.02(3) proceeding presump-

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[2] In addition to this petition for a supervisory writ, petitioners also subsequently filed a petition for review of the court of appeals' decision. As noted in the Judicial Council Committee's Note of 1981 to section 809.71, both procedures provide an avenue to this court. One practical difference between the two is that a petition for a supervisory writ is set over for full consideration by this court on its merits upon the affirmative vote of four or more justices, whereas a petition for review is granted on the affirmative vote of only three justices. *See Wisconsin Supreme Court Internal Operating Procedures*, Wis. B.Bull. 21 (Aug. 1984). We need not dwell in this case on that or any additional differences between the two approaches. There were sufficient votes present to fully consider this case regardless of the manner chosen to bring it to this court's attention. We also would neither have granted a petition for review nor ordered responses and oral argument to the petition for a writ had we not thought the legal issues present were of sufficient importance and novelty to justify this court's attention. Further, either way we must decide as a matter of law whether these proceedings must be presumptively opened or closed and, if an exercise of judicial discretion is involved, whether that discretion was abused. Since the petition for review was therefore unnecessary in this case, it is dismissed.

[3] This opinion will not address any potential unconstitutionality of section 968.02(3) since it has not been raised by the parties at this stage of the proceedings. It could be questioned under the

(Footnote continued on following page)

tively open or closed? Second, given such a presumption, what are the legal factors to be considered by the circuit judge in determining whether it should be overborne in any given instance? Third, did this judge properly recognize such factors and was there a basis in the record for her discretionary determination?

We hold that a section 968.02(3) hearing is subject to the same presumption of openness that applies to most judicial proceedings in Wisconsin.[4] This is not based on a conclusion that such a hearing is a "sitting of the court" within the meaning of section 757.14. Some pretrial activities have been deemed to be a sitting of the court. *See, e.g., State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis.2d 220, 340 N.W.2d 460 (1983) (voir dire proceeding); *State ex rel. Newspapers, Inc. v. Circuit Court*, 65 Wis.2d 66, 221 N.W.2d 894 (1974) (immunity hearing in John Doe proceeding). But a section 968.02(3) hearing is not a sitting of a court. The statute expressly provides that the proceeding is to be before a circuit judge and there is an express distinction between a judge and a court. *See* section 967.02(6), (7), Stats. (defining "judge" and "court"). This court has recognized that distinction in several cases including those cited above. Rather, the presumption of openness here is based upon other factors.

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[3] *continued*
separation of powers doctrine whether the judicial branch of government should be able to interfere with the normal power of the executive branch to decide whether criminal charges should be issued. *But see State v. Washington*, 83 Wis.2d 808, 266 N.W.2d 597 (1978) (constitutionality of John Doe proceedings upheld); *State ex rel. Kurkierewicz v. Cannon*, 42 Wis.2d 368, 166 N.W.2d 255 (1969) (discretion of district attorney to prosecute held subject to legislative direction). The fundamental fairness or due process aspect of the entire procedure might also be challenged, given that the hearing by statute is *ex parte* without the right of cross-examination.

[4] This conclusion is limited to circumstances when the hearing occurs because the district attorney "refuses" to issue a complaint. The issue of the openness of a hearing when the district attorney is "unavailable" to issue a complaint, the other basis for invoking the procedures of section 968.02(3), is not before us.

Initially, the statute itself contains no express provision for secrecy. Although a legislative direction that the hearing should be always closed might not necessarily be enforceable, it would at least have indicated that the legislature intended a presumption of secrecy. The statute didn't even indicate that the hearing "may" be secret as does section 968.26 pertaining to John Doe proceedings.

More important, a section 968.02(3) hearing is designed to be a method of scrutinizing the district attorney's decision to issue a complaint—a decision which the prosecutor usually makes out of the public eye. Thus the very purpose of the statute—to make possible the examination of the charging process in the rare instance—would be defeated if the procedures were closed for other than compelling reasons. Also, although this is not a formal sitting of a court, the judge is still performing a judicial-related function and is thereby charged with a responsibility for impartiality and fairness. The parties at such a proceeding expect that the judge will conduct a thorough hearing, examine all of the key witnesses and available relevant evidence, and render a dispassionate, unbiased decision on whether probable cause exists. As we noted in *La Crosse Tribune*, the great virtue in our American court system is that it is open to the public so that all will know that the courts, as instruments of government, are defending and not suppressing the rights of the people. 115 Wis. 2d at 242, 340 N.W.2d at 470. A hearing conducted under this statute is not only a check upon the prosecutor's decision not to file charges; additionally, it is a check performed under the tradition of judicial fairness and openness that our American system of law provides. Some jurisdictions have required openness under similar circumstances. *See, e.g., KFGO Radio, Inc. v. Rothe*, 298 N.W.2d 505 (N.D.1980).

A presumption of openness, however, does not mean that a judge in conducting a section 968.02(3) hearing loses the power to close the proceedings under some circumstances. We have held on numerous occasions that a court has the inherent power to exercise the discretion to close

a courtroom to the public. *See, e.g., La Crosse Tribune*; *Bloomer*. A judge conducting a section 968.02(3) hearing has the same authority and is subject to the same limitations on that authority.

The standard to be met before that discretion can be exercised is strict. We held in *La Crosse Tribune* that the circumstances necessary to trigger the discretion to close a judicial proceeding must be "compelling," "substantial," and "most weighty and overwhelming." 115 Wis. 2d at 234-36, 241, 340 N.W.2d at 467, 470. The particular factors that would justify closure in any given instance will vary depending upon the nature of the proceeding.

In a section 968.02(3) hearing, several factors might conceivably justify closure. The salacious nature of the evidence might embarrass the parties or somehow threaten the public interest. The complainant and other witnesses might want secrecy to avoid harassment, intimidation, etc., either from the defendants or the public, the likelihood of which would presumably be intensified by open proceedings. The potential defendant might desire closure to protect privacy and reputational interests, which could be jeopardized by openness should a criminal charge not result. There is a public policy interest in protecting the reputation of citizens. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 430, 279 N.W.2d 179, 185 (1979). In this type of procedure there is no right to any rebuttal or to present counter evidence. The resulting possibilty of unrefuted false accusations would certainly not serve reputational interests. Finally, as suggested in *La Crosse Tribune*, a legitimate fear might exist that substantial publicity would hinder efforts to provide a fair trial should criminal charges be eventually issued. In any given instance, other appropriate reasons might exist.

Whatever the particular reasoning, we indicated in *La Crosse Tribune* that initially the trial judge should recite on the record the factors that compel closure and why such factors override the presumption of openness. The entire process must be conducted in public and demonstrably must be a rational one. The rationality of it must

be shown on the record, evincing that the conclusion was reached on specific facts of record or which are reasonably derived by inference from the record. 115 Wis.2d at 236-37, 340 N.W.2d at 468. The conclusion that factors weighing in favor of closure are present must be based on articulable facts known to the court rather than unsupported hypotheses or conjecture. *See generally U.S. v. Edwards*, 672 F.2d 1289, 1294 (7th Cir.1982).

Thus, once factors considered by the judge to be sufficient to compel closure are stated, the focus of appellate review is whether the judge abused her discretion in deciding there were sufficient facts of record to justify the legal conclusion that those factors were present. A discretionary act to be upheld must be the product of a rational mental process by which the facts of the record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. *Jasper v. Jasper*, 107 Wis.2d 59, 64, 318 N.W.2d 792, 795 (1982). In reviewing an alleged abuse of discretion the question is not whether the appellate court would have reached the same decision, but whether under the facts and with the application of the correct legal standards, a reasonable trial judge could have reached a particular conclusion. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). An appellate court will not find an abuse of discretion unless it is evident that there was no rational basis for the trial court's decision, that is, a reasonable judicial mind in light of the law and the facts could not have reached the conclusion it did. *Wisconsin Public Service Corp. v. Krist*, 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981).

In the instant matter, we believe that all of Judge Connors' reasons might in some circumstances be compelling enough to order closure of the proceeding. However, none is sufficiently supported by the record in this case to provide a basis for her discretionary action.

Her concern over the potential traumatic effect of an open hearing upon this complainant was not justified, although concern over such injury to a sexual assault vic-

tim is usually appropriate. Complainant appeared by counsel and expressly advocated an open hearing. Under the circumstances, Judge Connors was therefore without factual justification, indicated on the record or capable of being reasonably inferred from the record, to conclude that closure was compelled by the best interests of this complainant.

We recognize, however, that society's legitimate concern in a criminal case is not only to impose criminal sanctions and to seek the truth, but also to make sure that the victim is not damaged or injured further. Here, complainant has already requested the additional public scrutiny of these proceedings. In the event a complaint is issued, complainant will have her day in court. At the present stage of the proceedings, in view of the publicity which complainant has not avoided, it would not appear that closure is needed for her protection. Certainly the need to protect her in light of the circumstances does not override in a compelling fashion the public nature of the proceedings.

While Judge Connors indicated that an open hearing would intimidate witnesses and impede the search for the truth, she failed to state the facts upon which such a conclusion could be reached. To the extent that her concern was with the chilling effect that publicity might have upon the complainant, it would appear, on the basis of the facts stated above, that the complainant, who sought publicity in this matter, would not likely be intimidated. We do not overlook the possibility that the very interest of the complainant in keeping the procedure public might have caused the trial judge to cast a jaundiced eye upon the complainant's public appearance. Regardless, while the reason given could be a compelling one in some instances for closure, here there was an insufficient factual predicate for reaching the conclusion to close on that basis.

The judge further feared that the salacious, obscene testimony that likely would be presented could be offensive to the public. However, the details of this alleged assault are no more lurid than that of most sexual assaults. Only

the identity of the participants makes this particular episode a matter of unusual public concern. The facts of the case are not in any way more salacious or obscene than dozens of other sordid episodes which are considered by our courts on a daily basis. The public's primary concern is with protection of minors from such information. *See* section 757.14. Judge Connors could have satisfied this concern by closing the proceedings to minors rather than to the entire public. As for adults who might be offended, the court has no obligation or prerogative to protect them from the truth unless some other compelling circumstance requires a closed hearing.

Judge Connors' concern over potential inability to obtain a fair trial should charges be issued is also not an adequate reason for closure within the context of this case. Defendants' counsel claimed that an open proceeding would result in publicity to the extent that a fair trial would be jeopardized. However, the record reflects that a significant amount of publicity has already been generated in this case. It is not evident that the additional publicity given to this proceeding would render a fair trial any more unattainable than it might already be. Nor is it clear that a fair trial would indeed be jeopardized. The law requires impartial—not ignorant—jurors. Despite the publicity, protections such as voir dire should insure that enough impartial jurors from a large metropolitan area like Milwaukee can be found. Other alternatives exist to assure a fair trial such as changes of venue, instructions and admonishments to the jury, etc.

In any event, the potential threat to a fair trial arising out of an open section 968.02(3) hearing in this instance was much too speculative to justify closure. Nevertheless, we are cognizant that in fact undue publicity could result in a less than due process trial. In addition to the protective procedures stated above, the last resort, of course, after conviction and proper post-trial motions, is to set aside the verdict because of undue and unfair publicity. This is a responsibility that the media must face up to in handling sensitive court proceedings. But that fact in

this case under these circumstances does not in itself compel a closed hearing.

We finally come to the potential for further damage to defendants' reputation by an open proceeding. Their counsel asserted that their reputations would be further irreparably damaged by a public hearing, even if no criminal charges were ultimately issued. Judge Connors agreed; because the proceeding was in essence to be an accusatory hearing to decide only whether criminal charges should be issued, revelation of the intimate details of the incident would certainly not serve their reputational and privacy interests. However, we do not believe she could properly have reached this conclusion based on the circumstances as then existed.

By the time Judge Connors faced the closure issue, defendants' reputations had already been significantly besmirched based on the limited information before us alone. Although without identifying them, the district attorney had publicly stated that, at the very least, they engaged in "indecent and immoral sexual overreaching" that was "reprehensible, shameful, and depraved" and "psychologically exploit[ive]." The district attorney further publicly implied that defendants conceded sexual activity had taken place and the only issue was whether complainant had consented; thereby suggesting that defendants themselves admitted illicit conduct. Newspapers in both Milwaukee and Green Bay, two of this state's largest population centers, had printed dozens of articles disclosing many of the details of the alleged incident; two of those newspapers named defendants.

We cannot conclude that open section 968.02(3) proceedings could reasonably have been foreseen to damage defendants' reputations significantly further. If open proceedings are followed by the issuance of criminal charges, their reputations will obviously be subject to substantial additional damage, far in excess of any injury possible from merely this preliminary process. If no criminal charges result, their reputational and privacy interests will have suffered little, if any, damage beyond that which has al-

ready occurred. If anything, they will finally be free of the accusation of having committed a crime. Under these circumstances, the potential for reputational injury is minor and not of a compelling stature such that closure is justified.

In conclusion, we hold that a section 968.02(3) proceeding is to be opened to the public in the absence of a compelling reason for closure. There were insufficient facts of record to justify this judge's decision to close and therefore an abuse of discretion occurred.

The petition for a supervisory writ is granted. The stay of further proceedings before the circuit judge in *Petition of K.M.* ordered by this court on March 7, 1985, is vacated. It is ordered that further proceedings in that matter shall be conducted in accordance with this opinion. The petition for review from the court of appeals' decision is dismissed. No costs are awarded to any party.

CECI, *Justice* (dissenting).

In this case, Judge Connors exercised her inherent power as a judge and determined that justice required that this precomplaint hearing be closed to the public. I must dissent in this case, because I disagree with the majority's holding that precomplaint hearings, pursuant to section 968.02(3), Stats., are presumptively open to the public. I also object to the majority's substituting its judgment for that of Judge Connors in holding that there are insufficient facts to justify Judge Connors' decision to close the precomplaint hearing. I would deny the petition for a supervisory writ and affirm the decision of the court of appeals, which held that no presumption of openness attaches to precomplaint hearings and that Judge Connors did not abuse her discretion in closing the hearing.

First, the majority provides two reasons for its holding that section 968.02(3) hearings are presumptively open to the public: (1) The statute itself contains no express provision for secrecy, and (2) the purpose of the statute—to

scrutinize the district attorney's decision to issue a complaint—would be defeated if the hearing were closed for other than compelling reasons. Maj.op. at 213-214. I do not believe that these reasons justify the broad holding that section 968.02(3) hearings are presumptively open to the public. The majority erroneously reads something into the statute that clearly was not supplied in the statute by our legislature.

I am of the opinion that our legislature did not intend that the hearing be presumptively open to the public. Although the statute does not contain an express provision for secrecy, it also does not mandate that the hearing be open. I start with the premise that the public has no constitutional right to attend a precomplaint hearing. There is a limited public right to access to criminal trials under the first amendment to the United States Constitution. *See, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). However, pretrial proceedings can often be closed to the public. *See, Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (hearing on suppression of evidence). Exceptions to this have arisen only under limited circumstances that are not present in this instance. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*voir dire* examination of prospective jurors in a criminal case). No case has extended the nonabsolute public right of access to a proceeding occurring prior to the issuance of a criminal complaint, such as here.

Additionally, the public has no statutory right to attend a precomplaint hearing. Section 757.14, Stats., mandates that "[t]he sittings of every court shall be public and every citizen may freely attend the same. . . ." The majority agrees that this statute does not apply in this case because a section 968.02(3) hearing is not a "sitting of a court." Slip op. at 6. If the legislature had intended this hearing to be open, I believe it would not have called for the proceedings to be conducted merely by a judge. Also, section 807.04, requires that "[a]ll trials, and all hearings

at which oral testimony is to be presented, shall be held in open court." This statute is equally inapplicable to precomplaint hearings, because section 968.02(3) does not require that testimony be given under oath or affirmation. Finally, if open proceedings were contemplated by the legislature, it would not have had to specifically provide in the statute that the district attorney could attend the hearing. A construction which makes statutory language superfluous is to be avoided. *Wis. Elec. Power Co. v. Public Service Comm.*, 110 Wis.2d 530, 534, 329 N.W.2d 178 (1983). Since our legislature has not explicitly required that precomplaint hearings be open, the judge should not be restricted from exercising his or her inherent power in ordering closure of the precomplaint hearing. *See, State ex rel. La Crosse Tribune v. Circuit Ct.*, 115 Wis.2d 220, 234-35, 340 N.W.2d 460 (1983).

Second, the legislative history of section 968.02(3), Stats., supports the conclusion that precomplaint hearings are not presumptively open. Section 968.26, provides for a John Doe hearing which, by the words of the statute, allows for a secret hearing. Sections 968.02(3) and 968.26 share identical roots. This court has construed the predecessor of these statutes as authorizing a closed, secret hearing. *State ex rel. Kowaleski v. District Court*, 254 Wis. 363, 370, 36 N.W.2d 419 (1949).

Third, the nature of a section 968.02(3) hearing does not require that the hearing be open. Section 968.02(3) provides an avenue for a complainant in two separate circumstances. A circuit judge may permit the filing of a complaint if a district attorney refuses to do so or if he is unavailable to do so. The majority presumes that the judge cannot check the authority of the district attorney unless the precomplaint hearing is open. I disagree. Under section 968.02(3), it is the duty of the judge to determine if there is "probable cause to believe that the person to be charged has committed an offense. . . ." There is no reason to believe that the judge cannot conduct a thorough hearing and make an unbiased determination of probable cause in the absence of the press and the public. In

issuing complaints, the district attorney uses his or her discretion to protect the reputation of those not yet charged with a crime. The reputation of such persons is of equal importance in a precomplaint hearing before a judge, especially given the fact that they have no right of cross-examination. *See*, section 968.02(3). The judge at a precomplaint hearing acts as a surrogate district attorney; he or she must make a determination of probable cause. It would be unrealistic to require that the prosecutor's charging conference be open to the public and, in the same regard, neither should a section 968.02(3) hearing be open to the public.

Finally, and perhaps most importantly, the principles of fundamental fairness necessitate a holding that section 968.02(3) hearings are not presumptively open. Although historically, adversarial proceedings are open to the public, precomplaint hearings are not adversarial. The majority reasons that section 968.02(3) hearings are subject to the same presumption of openness that applies to most judicial proceedings in Wisconsin. Slip op. at 6. However, the majority fails to distinguish precomplaint from post-complaint proceedings. I note that other criminal *ex parte* proceedings in this state are traditionally closed to the public. *See*, section 968.12, Stats. (search warrants); section 968.04 (arrest warrants); sections 968.28-968.31 (interception of wire or oral communications); section 756.147 (grand jury proceedings); and section 968.26 (John Doe proceedings). Again, no case has extended the nonabsolute public right of access to a proceeding occurring prior to the issuance of a criminal complaint.

In this case, charges have not yet been issued against the accused. The accused are not yet defendants in this action, although the majority improperly identifies them as defendants (maj.op. at 216). The accused in this case desire closure to protect their privacy and reputational interests, which would be jeopardized by an open hearing should a criminal charge not result. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 430, 279 N.W.2d 179 (1979), stressed that there is a public policy interest in protect-

ing the reputations of citizens. Section 968.02(3) mandates that "[t]he hearing shall be ex parte without the right of cross-examination." There is no right to any rebuttal nor the right to present counter evidence in the course of this *ex parte* hearing. False accusations could be made in detail with no possibility of contemporaneous rebuttal. If this stage of the criminal process were public, before there is even a finding of probable cause or a determination to issue a charge, the potential for damage to reputational interests would be enormous.

For these reasons, I would hold that section 968.02(3) does not require that precomplaint hearings be open to the public. I believe that the majority is wrongly legislating when it holds to the contrary. Thus, the issue on appeal becomes whether the judge abused his or her discretion in closing the hearing. Contrary to the majority's position, I do not believe that this court must find a substantial, compelling reason to close the hearing before it will affirm the judge's discretion of closure. Maj.op. at 211. Therefore, I move to the issue of whether Judge Connors abused her discretion in closing this hearing.

The majority summarizes the reasons provided by Judge Connors as to why she believed the hearing in this case should be closed. Maj.op. at 212. I believe that the last factor is sufficient to compel closure in this case, which is the following:

> "5. This was only an accusatory hearing and even if no charges were eventually issued, revelation of the details of the incident to the public would cause defendants 'unnecessary agony or suffering.' " Maj.op. at 212.

I agree with Judge Connors and the accused that their reputations would be further irreparably damaged by a public hearing, even if no criminal charges were ultimately issued. As I have stressed above, these accused have no right to rebut or present counter evidence in the course of this proceeding. False accusations could be made in detail, with no possibility of contemporaneous rebuttal.

The majority falsely assumes that because the district attorney in this case has publicly released his statement and because the press has printed dozens of articles disclosing the details of the alleged incident, no further harm can come to the reputations of these accused. I strongly disagree. First, further significant publicity is inevitable if the hearing is open. Second, although two newspapers have disclosed the names of these accused, who are not yet defendants, as the majority suggests, these disclosures were limited. The names of these accused have not been highly publicized.

I believe that injury to the reputation and privacy of these accused can be, as a matter of law, a compelling reason for closing a section 968.02(3) hearing. While another judge or the majority in this case might reasonably have reached a different conclusion, there were sufficient facts in the record upon which Judge Connors could reasonably conclude that the protection of reputational and privacy interests of these accused compelled closure. I strongly object to the majority's substituting its judgment for that of Judge Connors. Media counsel conceded before the judge that defendants were people of "substantial reputation." The record reflects that one of the papers owned by petitioner Newspapers, Inc. has stated it will publicly identify the accused if there is "some official action or court proceeding" that names them. An open section 968.02(3) hearing will do just that, regardless of whether or not charges are issued here. Based upon the facts as developed to date, the arguments of their counsel and the reasonable inferences to be drawn therefrom, Judge Connors could in the exercise of discretion conclude that given their reputations and the likely additional damaging publicity an open section 968.02(3) hearing would engender, there was a compelling reason for a closed proceeding. Her decision to do so was not an abuse of discretion, particularly in light of the fact that the procedure, which is only a charging matter in the nature of a prosecutor's conference, does not permit any counter evidence. The procedure is not a mini-trial, for only the complain-

ant has the right to produce evidence. When this stage of the criminal process is made public, before there is even a finding of probable cause or a determination to issue a charge, the threat to reputational interests is enormous, not only for the target of the accusation but also for the accuser. Victims should be able to discuss their perceived grievances with a judge with the assurance that their accusations will not be spread before the public if the judge declines to authorize the issuance of a complaint.

The legal principles involved are not dependent upon the veracity of the accusations by this publicity-seeking "complainant." No matter what the outcome is of these open proceedings, these accused are obliged to submit to the odium of the accusations, based, perhaps, upon insufficient evidence, without ever having, as in a trial, the opportunity to meet their accuser and reply to her attack. This situation is one that should offend everyone's sense of fair play and is certainly not conducive to the decent administration of justice.

The holding of the majority smacks of the star chamber inquisitions, condemning without the opportunity to be heard, which weakens reputational and privacy rights of those not yet charged with a crime. In our republic of freedom-loving people, reputational interests and privacy, rights should be paramount in precharging inquiries.

The petition for a supervisory writ should be denied in this case, and, therefore, I must dissent.

I am authorized to state that Justice WILLIAM G. CALLOW joins in this dissenting opinion.

BABLITCH, *Justice* (dissenting).

I agree with the majority that a presumption of openness attaches to a hearing under section 968.02, Stats. Open government is a significant and powerful check on th potential for abuse of power by any branch of government, including the judiciary. The vitality of democracy is dependent upon an informed citizenry. The public does, indeed, have a "right to know".

That right to know, however, must always be balanced against equally compelling considerations involving individual rights. The legislature, in enacting the open meetings law, recognized that balance when it created certain exceptions to presumptively open governmental meetings that involve "the investigations of charges against specific persons . . . which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person . . . involved in such problems or investigations." Section 19.85(1)(f), Stats. Similarly, this court has recognized that balance in providing that a judicial proceeding may be closed only for substantial and compelling reasons. *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis.2d 220, 340 N.W.2d 460 (1983).

When individuals of high visibility and public stature are involved in the criminal system, there is always concern among the general public that those people will be accorded privileged treatment.[1] This privileged treatment must not be allowed to happen. People of prominence, of high public visibility, are entitled to no more protection than anybody else. But in our efforts to assure that, we must also be mindful that they are entitled to no less. I conclude that an open hearing under the circumstances presented here would provide less protection to the accused than that to which they are entitled. Given the fundamental unfairness of the one-sided procedures mandated by the statute, along with the intensity of the publicity and the interest of the public that this hearing will generate statewide, I conclude that the accused's rights to a fair trial, if charged, will be gravely imperilled; if they are not charged, the damage to their privacy and reputational interests will be enormous. Therefore, I conclude that while a sec. 968.02, Stats., hearing is presump-

[1] This case involves two highly visible professional football players. It could, in a future case, involve highly visible employers, supervisors, public officials, clergy, business men, business women, etc., etc., etc.

tively open, this particular hearing must be closed to the public.

The proposition that the procedures of a sec. 968.02, Stats., hearing offend basic notions of fairness can hardly be disputed. The protections that our adversarial system provide for determining truth are notably absent: the accused has no right to be heard in any manner. The accused has no right to testify, no right to call witnesses, no right to present evidence, no right to cross-examine the accuser, no right to counter any false allegations. The unfairness of the absence of the right to be heard is magnified by the lack of restraints on the accuser. The accuser, in a public forum, is unrestrained by the normal constraints of our laws of libel and slander. That is because the testimony in a public proceeding such as this is privileged under the law. *Bergman v. Hupy*, 64 Wis.2d 747, 750-54, 221 N.W.2d 898 (1974).

That the accusations of the accuser, be they true or false, libelous or not, will be reported statewide in excruciating detail in all the media, cannot be denied. This case has already generated intense media interest. It has all the ingredients of a Sidney Sheldon best-seller: sex, booze, an exotic-dancer, professional football players. The reporting of the accuser's allegations will not just be confined to the immediate area of the offense; it will be statewide. Unfortunately for the accused, however, it will be the accuser's uncontradicted accusations, bereft of the benefit of cross-examination and counter evidence, that will be read, heard and seen by the citizens of the entire state. Normally, a change of venue can protect an accused from the effects of extensive pretrial publicity. But where can these accused go, after this, for an impartial jury if they are subsequently charged and tried? The majority correctly points out that the law requires impartial, not ignorant jurors. Slip op. at 215. However, the one-sided publicity that this hearing will produce can hardly result in impartial jurors. Potential jurors around the state will certainly have knowledge of the complainant's version of the of-

fense; unfortunately, it will be the type of knowledge that our normal adversarial process would *never* allow.

But now consider the alternative scenario: that after this public hearing and resultant publicity the judge decides that formal charges are not justified and therefore will not be filed. Given the nature of the charges here, it will be small consolation to the accused and their families that, as the majority states, "they will finally be free of the accusation of having committed a crime." Slip op. at 216.

As the majority rightly points out, the accused's reputations have already been significantly besmirched. That is not a sufficient justification, however, to allow this besmirching to continue. If anything, it is reason to stop it, before there is complete devastation, economic and personal, to the accused and their families. To this point, the public has not been subjected to just the one-sided accusations of the accuser. Although there has been substantial publicity, many newspapers and other media have not disclosed the names of the accused. An open hearing will end all of that. If there is merit to the complainant's charges, this will all come out eventually; if there is no merit to her charges, the accused deserve the little privacy and reputational interests that are still left to them and their families.

In sum, the procedures provided for in the statute are offensive to basic notions of fundamental fairness. Whether or not these procedures are violative of constitutional guarantees is a question that has not yet been presented to this court. Meanwhile, the legislature could appropriately address the fairness of the procedure, not by closing the hearing, but by allowing a more balanced public hearing. The value of a proceeding which provides a check on the prosecutor's decision to refuse to file a charge is evident. Clearly the complainant in this case is entitled to have the district attorney's charging decision put before judicial scrutiny. The legislature can easily accommodate the interests of the accuser with those of the accused by providing greater procedural safeguards in this proceeding.

The accused, because of their public prominence, are entitled to no more protection than anybody else. They are, however, entitled to no less. I conclude there are substantial and compelling interests present that go directly to the fundamental rights that we all enjoy. The principles of the majority opinion will apply not only to the unnamed accused in this case, but to anybody in the future who might find themselves accused of a crime by someone who asserts before a judge, after a district attorney has turned them down, that he or she has been criminally wronged. That should give everyone pause. Accordingly, I dissent.

APPENDIX 2

STATE of Wisconsin ex rel. NEWSPAPERS, INC., WTMJ, Inc., Green Bay Press Gazette, WISN-TV, Division of Hearst Corporation, WISN Radio and WBTT Radio, Petitioners,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY, the Honorable Arlene D. Connors, presiding, certain unnamed prospective defendants, District Attorney for Milwaukee County and K.M., Respondents.

No. 85-0461-W.

Supreme Court of Wisconsin.

Sept. 27, 1985.

Prior report: 124 Wis.2d 499, 370 N.W.2d 209 (1985).

PER CURIAM (on motion for reconsideration).

The motion for reconsideration is denied, without costs.

APPENDIX 3

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

Nos. 85-0148-W
85-0149-W

STATE OF WISCONSIN ex rel., WISN-TV, Division of The Hearst Corporation; WISN RADIO and WBTT RADIO,

Petitioners,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE ARLENE D. CONNORS, Presiding Judge, K.M. and Unnamed Petitioners,

Respondents.

No. 85-0155-W

STATE OF WISCONSIN ex rel. NEWSPAPERS, INC., WTMJ, INC., and GREEN BAY PRESS GAZETTE,

Petitioners,

v.

THE CIRCUIT COURT FOR MILWAUKEE COUNTY, the HONORABLE ARLENE D. CONNORS, presiding, K.M., and Unnamed Petitioners,

Respondents.

(Caption continued on following page)

No. 85-0172

In re Petition of K.M.:

WISN-TV, Division of The Hearst Corporation, WISN Radio, WBTT Radio, and Newspapers, Inc.,

Appellants,

v.

CERTAIN UNNAMED PETITIONERS,

Respondents.

APPEALS from an order of the circuit court for Milwaukee county: ARLENE D. CONNORS, Judge. *Appeals dismissed.*

MANDAMUS to the circuit court for Milwaukee county: ARLENE D. CONNORS, Judge. *Writ denied.*

PROHIBITION to the circuit court for Milwaukee county: ARLENE D. CONNORS, Judge. *Writ denied.*

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

WEDEMEYER, P.J. This is an original action in the court of appeals seeking a supervisory writ directed to the circuit court for Milwaukee county, the Honorable Arlene D. Connors, presiding. Petitioners, representatives of the print and electronic media, request a writ of prohibition to prevent Judge Connors from excluding the public from a judicial precomplaint hearing under sec. 968.02(3), Stats. We conclude that (1) the language, history and function of sec. 968.02(3) indicate that no presumption of openness should apply to the precomplaint hearing; (2) Sec. 757.14, Stats., does not require that the hearing be open, because the hearing is not a "sitting of the court;" (3) the public does not have a right to attend the hearing under the first and fourteenth amendments to the United States Constitution and art. I, sec. 3 of the Wisconsin Constitution; and (4) the trial judge did not misuse her

discretion by closing the hearing. We therefore deny the petition for writ of prohibition.

The factual background of this case is as follows. On October 10, 1984, K.M. complained to police that she had been sexually assaulted by two men. An investigation followed, and the district attorney determined that he would not issue a criminal complaint against the two men. On November 26, 1984, K.M. filed a petition in circuit court asking that a hearing be held pursuant to sec. 968.02(3), Stats., to determine whether a complaint should be filed. The case was assigned to Judge Connors, who scheduled the hearing for January 18, 1985. The judge indicated that she would take testimony from witnesses under oath in the presence of the court reporter, clerk, counsel, K.M., the putative defendants, and any members of the public who wished to attend.

On January 15, 1985, the putative defendants petitioned this court for a writ of prohibition restraining Judge Connors from proceeding with the hearing. We denied the petition as premature, because Judge Connors had merely made some oral statements as to how she intended to proceed, and the statements did not provide an adequate record upon which a writ could be issued.

On January 16, 1985, Attorney William Jennaro, appointed special counsel to the judge for the pendency of the proceeding, moved for an order determining whether the public should be excluded from the hearing. Judge Connors heard arguments and, on January 17, 1985, issued an order that the hearing would be closed. The petitioners filed notices of appeal from the order, petitions for an alternative writ of prohibition to prevent Judge Connors from excluding them from the hearing, and a petition for an alternative writ of mandamus to compel Judge Connors to admit them to the hearing. This court stayed the hearing pending our decision on the petitions for the supervisory writs.[1] We now deny the petitions. The sole issue with which we are concerned is whether Judge Connors acted improperly in closing the complaint hearing.

1. *History and Interpretation*

The first question before us is whether a sec. 968.02(3), Stats., hearing is subject to the same presumption of openness that applies to most judicial proceedings in Wisconsin. Historically, the adversarial proceedings of courts in Wisconsin have generally been open to the public. Support for this tradition is found in our constitution, the statutes and our common law. Even some pretrial activities have been declared open if they are deemed to be a "sitting of the court" within the meaning of sec. 757.14, Stats. *See, e.g., State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983) (voir dire proceeding); *State ex rel. Newspapers, Inc. v. Circuit Court*, 65 Wis. 2d 66, 221 N.W.2d 894 (1974) (immunity hearing in John Doe proceeding).

Section 968.02(3) provides:

> If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

When a court is called upon to interpret a statute, two criteria are most often employed: (1) "the intent of the legislature" or (2) "the meaning of the statute." 2A J. Sutherland, *Statutes and Statutory Construction* sec. 45.05, at 20-21; sec. 45-07, at 29 (Sands 4th ed. 1984). From our examination of sec. 968.02(3), Stats., we conclude that regardless of whether the statute is viewed from "the intent of the legislature" or from "the meaning of its words expressed in the statute" we travel the same path of interpretation.

The district attorney of a county where a crime is alleged to have been committed is primarily responsible for the issuance of a criminal complaint if the circumstances

warrant it. Sec. 968.02(1), Stats. If, however, on presentation of the evidence, the district attorney refuses to issue a complaint, sec. 968.02(3) provides a second opportunity for the issuance of charges by authorizing a judge to take such action. The legislative note to sec. 63, ch. 255, Laws of 1969, which created sec. 968.02(3), states that the subsection's purpose is to provide "a check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued, by providing for a judge to authorize its issuance [and] a vehicle for the issuance of complaints when the district attorney is unavailable."

Much of the language of sec. 968.02(3), Stats., is based upon sec. 6.02 of the American Law Institute *Model Code of Pre-Arraignment Procedure: Tentative Draft No. 1* (1966), but it differs from the model code in several ways. Section 968.02(3) does not afford the district attorney an opportunity to be heard, but requires that the district attorney be informed of the hearing and be permitted to attend. Further, it expressly states that the hearing must be ex parte and that no right to cross-examination exists. In contrast, the note to sec. 6.02 of the model code states: "The judge is . . . given power to permit the filing of a complaint over the objection of the prosecutor but only after giving him a hearing on the issue." *Id.* at 55.

Although based on the model code, the section's conceptual roots reach deeply into Wisconsin's legislative past. Its progenitor first appears in the 1839 Statutes of the Territory of Wisconsin, at 379, in sec. 2 of An Act To Prevent The Commission Of Crime. In 1878 it was renumbered as sec. 4776, Rev. Stats. (1878), and remained so until recodified as sec. 361.02, Stats. (1925), by ch. 4, Laws of 1925. In essence, it provided that a magistrate was obligated to examine under oath a complainant and any witnesses produced by the complainant regarding any criminal activity. This section was the predecessor of not only sec. 968.02(3), Stats., but also of sec. 968.26, Stats., the statutory authorization for John Doe proceedings. *See State v. Washington*, 83 Wis. 2d 808, 819 n.6, 266 N.W.2d

597, 603 (1978). *See also* Platz, *The 1949 Revision of the Wisconsin Code of Criminal Procedure*, 1950 Wis. L. Rev. 28, 41-42; 42A Wis. Stat Ann. 21, Historical Note (1971).

As secs. 968.02(3) and 968.26, Stats., presently exist, we note similarities and dissimilarities. Both sections, to varying degrees, provide for a proceeding of inquiry, directing that such inquiry be made by a judge and that there be no right to cross-examination.

The John Doe statute provides more procedural mechanics than does sec. 968.02(3), Stats. It is an instrument of investigation, permitting the judge to subpoena witnesses and to take testimony under oath. The proceeding and testimony must be recorded. Testimony may be compelled by threat of contempt, although the actual compulsion must be exercised by a "sitting court."

In contrast, the precomplaint hearing of sec. 968.02(3), Stats., may be activated only when a district attorney has refused or is not available to issue a charge. An ongoing inquiry into the continuing existence of the activities complained of and the discovery of any additional criminal matters is not contemplated. The determination of probable cause is central to its concern. No express powers, however, are granted to the judge.[2]

Section 968.02(3), Stats., unlike sec. 968.26, Stats., contains no express provision for secrecy. Although the John Doe proceeding generally is conducted in secret, sec. 968.26 merely declares that "the examination [of the witnesses] *may* be secret." (Emphasis added.) The petitioners argue that since this is so, one cannot analogize that a 968.02(3) hearing should be secret because of its common ancestry to a John Doe proceeding. We agree, but do not accept the petitioners' conclusion that the hearing therefore must be open. The intent of the legislature in enacting the statute, along with the plain meaning of the words used, indicate that the hearing is not presumptively open.

As observed earlier, the legislative comment to sec. 968.02(3), Stats., discloses that the purpose of the section

is to neutralize the "mischief" of a district attorney in refusing to issue a criminal complaint. It provides a second chance for an individual who initially was turned away by the prosecutor to now be successful. Alternatively, it provides a vehicle for issuance of a criminal complaint when the district attorney is unavailable. Conceptually, the activity authorized by the statute is coterminous to the action initially taken by a prosecutor prior to deciding whether to issue a complaint. The petitioners do not argue that a prosecutor's charging decision is open to the public.

There are, however, some important expressed distinctions between a charging conference and the activity authorized by sec. 968.02(3), Stats. First, the statute requires the judge to conduct a "hearing." The nature and extent of the hearing is not delineated but is qualified by the stricture "[t]he hearing shall be ex parte without the right of cross-examination."

A hearing is a type of proceeding, which itself is a very comprehensive term and generally means a course of action or a mode for enforcing a legal right. A hearing implies giving audience to someone or something, *State v. Orris*, 269 N.E.2d 623, 624 (Ohio Ct. App. 1971), or providing a party with an opportunity to present a point of view. *Colonial Trust Co. v. Austin*, 54 A.2d 503, 504 (Conn. 1947).

The term "ex parte" connotes one-sidedness. *Black's Law Dictionary* 661 (rev. 4th ed. 1968). An "ex parte proceeding" is a proceeding had on application of one party only, for his benefit only and without notice to or contestation by a person adversely interested. *Ex parte City of Ashland*, 76 S.W.2d 43, 45 (Ky. Ct. App. 1934). *See also White v. State*, 457 P.2d 650, 652 (Alaska 1969); *National Development Corp. v. Township of Harrison*, 438 A.2d 1053, 1057 (Pa. Commw. Ct. 1982). "Ex parte" does not, however, generally connote secrecy or a secret hearing.[3]

The denial of the right to cross-examine is clear and obvious and requires no explication.

Of additional note is the role of the prosecutor. Under sec. 968.02(3), Stats., the prosecutor must be informed of the hearing but, in conformity with the "ex parte" requirement, no proviso exists that the prosecutor may be heard or is required to be at the hearing.

The statute provides that the judge "may" permit a complaint, but that the prosecutor "shall" be informed of the hearing and that the hearing "shall" be ex parte with no cross-examination. In statutory interpretation, "may" generally is construed as permissive and "shall" generally is construed as mandatory, unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature. *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386, 389 (1963).

In Sutherland, *supra*, sec. 57.11, at 665, we read:

> Where both mandatory and directory verbs are used . . . in the same section, . . . it is a fair inference that the legislature realize the difference in meaning and intended that the verbs used should carry with them their ordinary meanings. This is especially true when "shall" and "may" are used in close juxtaposition under circumstances that would indicate that a different treatment is intended for the predicates following them. [Footnote omitted.]

We hold that "shall" as used in sec. 968.02(3), Stats., is mandatory.

Were sec. 968.02(3), Stats., totally silent as to the manner and the type of proceeding that is to be conducted, the argument that openness to the public ought to prevail to insure the benefits of a free and open society would convey heavy persuasive weight. Here, however, the legislature has expressly declared that a judge, not a court, must conduct the hearing; that the hearing must be ex parte without the right of cross-examination; that the judge must inform the district attorney of the hearing, which he or she may attend but may not participate in; and then, if the judge finds probable cause that a crime

was committed by the person to be charged, he or she may, but need not, authorize the filing of a complaint. From the procedure outlined and the mandatory language in which it is couched, we conclude that it is more probable that the legislature did not intend the hearing to be open. We conclude that the intent of the legislature and the plain meaning of the words used reasonably demonstrate that the judge, consistent with the inherent power of his or her position, may in the exercise of discretion order closure in a sec. 968.02(3) precharging hearing. *See La Crosse Tribune*, 115 Wis. 2d at 234-35, 340 N.W.2d at 466-67 (citing *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 536, 78 N.W.2d 921, 925 (1956); *Bloomer v. Bloomer*, 197 Wis. 140, 221 N.W. 734 (1928)).[4]

2. *Applicability of Sec. 757.14*

The petitioners argue that sec. 757.14, Stats., mandates that the precomplaint hearing under sec. 968.02(3), Stats., be open to the public. Section 757.14 provides:

> The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise provided by law on the examination of persons charged with crime; provided, that when in any court a cause of scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the court is sitting all minors not necessarily present as parties or witnesses.

We hold that sec. 757.14 is not applicable to a hearing under sec. 968.02(3), because such a hearing is not the "sitting of a court" within the meaning of sec. 757.14.

Section 968.02(3), Stats., provides that the hearing is to be before a "circuit judge." Section 757.14, Stats., in contrast, refers to sittings of the "court." The legislature has drawn a distinction between a judge and a court. *Compare* sec. 967.02(6), Stats., defining "judge," *and* sec. 967.02(7), defining "court."

The supreme court also has recognized the distinction between a judge and a court. In *State ex rel. Newspapers*, the supreme court considered John Doe proceedings, which are held before "a judge." The supreme court distinguished between a judge and a court, stating that it was a "generally recognized fact that a judge is only part of a court." 65 Wis. 2d at 71, 221 N.W.2d at 896. Consistent with this distinction, the court held that although the John Doe proceeding, conducted before a judge, should remain secret, *id.* at 72, 221 N.W.2d at 897, immunity hearings, which are conducted before a court, were required by the predecessor to sec. 757.14 to be public. *Id.* at 73, 221 N.W.2d at 897. *See also Washington*, 83 Wis. 2d at 828 & n.15, 266 N.W.2d at 607, and cases cited therein (judge not equivalent of court).

The supreme court determined in *Newspapers* that sec. 757.14, Stats., applies only to "courts," in keeping with the plain meaning of the statute. It similarly determined, in *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 534-35, 118 N.W.2d 939, 943 (1963), that the John Doe statute, which is similar in background and function to sec. 968.02(3), Stats., applies only to the judge or magistrate conducting the John Doe proceeding. We may not disregard the distinctions drawn by the legislature and the supreme court. Section 757.14 applies only to proceedings before courts, and not to precomplaint hearings under sec. 968.02(3), which are held before circuit judges.

The petitioners argue that the supreme court has defined the term "sitting of a court" in functional terms, so that whenever a judge conducts business accompanied by the court reporter, the bailiff, the clerk of court, the parties, witnesses and counsel, the proceedings are a "sitting of the court." They further argue that because Judge Connors has indicated that all these functionaries will be present at the precomplaint hearing and that witnesses will be subpoenaed, their testimony will be taken under oath, and a transcript of the proceedings will be made, the hearing will in fact be a "sitting of the court." We disagree.

First, the cases cited by the petitioners to support their argument merely note that when a court is sitting, certain functionaries are present and specified procedures are followed. They do not hold that a court is sitting *whenever* the listed functionaries are present or procedures followed. In *La Crosse Tribune*, the judge conductd a *voir dire* proceeding in his chambers, accompanied by the court reporter, the clerk, counsel and the defendant, but excluded the public. The supreme court held that adjourning the proceeding to the judge's chambers did not mean that the court was no longer sitting; the court had merely changed its location, not its nature as a court. 115 Wis. 2d at 232-33, 340 N.W.2d at 466.

In *Jackson*, cited by the petitioners, the issue was whether a magistrate conducting a John Doe proceeding had the power to compel self-incriminating testimony and to grant immunity from prosecution under sec. 325.34, Stats. (1961).[5] The supreme court held that because sec. 325.34 referred to a "court," and a John Doe proceeding was conducted by a magistrate, sec. 325.34 did not apply. The supreme court noted that certain procedural formalities were woven into action by a court, which "tend to insure the considered and responsible exercise of an important power," 18 Wis. 2d at 536, 118 N.W.2d at 943, but did not hold that the presence of those formalities necessarily implied that a proceeding was a "sitting of the court."

In *Newspapers*, cited by the petitioners, the supreme court held that immunity hearings in John Doe proceedings were required by sec. 256.14, Stats. (1973),[6] to be open to the public. It discussed the distinction drawn in *Jackson* between a court and a judge, but only in the context of establishing that *Jackson* recognized that immunity hearings were governed by sec. 256.14. *See Newspapers*, 65 Wis. 2d at 71, 221 N.W.2d at 896. Again, it did not hold that the presence of formalities necessarily implied the "sitting of a court."

Further, sec. 968.02(3), Stats., is silent as to which, if any, of the formalities identified in *Jackson* and *News-*

papers must be used at the precomplaint hearing. Here, Judge Connors has stated that she intends to proceed with the full complement of personnel and procedures that accompany a formal sitting of the court. Section 968.02(3) does not indicate, however, that this is necessary in every case. We hold that the nature of a sec. 968.02(3) hearing cannot be changed from a proceeding before a judge to a proceeding before a court simply by adopting several or all of the formalities used in court hearings. A contrary holding would, in addition, make it necessary to determine, whenever a judge adopted a new combination of formalities, whether the judge had adopted enough of the essential formalities to convert the precomplaint hearing into a sitting of the court. We eschew the creation of such an exercise in hairsplitting.

We also note that a John Doe proceeding incorporates such formalities as a court reporter, court clerk and bailiff, witnesses and their counsel, subpoenaing of the witnesses and examination of witnesses under oath, with the entire proceeding possibly culminating in a signed and verified complaint and a warrant for the accused's arrest. The supreme court nevertheless held in *Jackson*, 18 Wis. 2d at 536, 118 N.W.2d at 943, that John Doe proceedings were not before a "court."

In summary, because a sec. 968.02(3), Stats., hearing is not a sitting of the court, sec. 757.14, Stats., does not require that the hearing be open to the public.

3. *Constitutional Right of Access*

The petitioners claim they have a right under the first and fourteenth amendments and Wis. Const. art. I, sec. 3 to attend the precomplaint hearing. Relying on *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 104 S. Ct. 819 (1984), the petitioners make the broad statement that "free speech rights apply in access-to-court cases." A review of the relevant case law discloses that although the public has a qualified right of access under the first amendment to criminal trials and voir dire proceedings

(and, possibly, suppression hearings), and although pretrial suppression hearings are presumptively open under the accused's sixth amendment public trial guarantee, no case holds that the public has a constitutional right to attend a criminal investigatory proceeding which takes place prior to the issuance of any charge.

It is well established that a criminal defendant has the right to a public trial under the sixth amendment. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979). The sixth amendment right to a public trial belongs to, and is for the benefit of, the defendant, not the public. *Id.* at 380-82 & n.9.

The public does, however, have a right of access to criminal trials under the first amendment. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The public's right to attend criminal trials is not absolute; the state can deny the right of access where the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. *Globe Newspaper*, 457 U.S. at 606-07.

Historically, pretrial proceedings have been closed to the public. *Gannett*, 443 U.S. at 387-90. The qualified first amendment right of the public and press to attend a criminal trial was recently extended to the voir dire portion of the criminal proceeding. *Press-Enterprise*, 104 S. Ct. at 824 & n.8. There may also be a qualified constitutional right to attend a pretrial suppression hearing. *See Waller v. Georgia*, ___ U.S. ___, 104 S. Ct. 2210, 2214-15 (1984) (citing *Gannett*, 443 U.S. at 391-92, 397 (Powell, J., concurring). 406 (Blackmun, J., dissenting in part)). *See also Application of the Herald Co.*, 734 F.2d 93, 99 (2d Cir. 1984), and cases cited therein. A pretrial suppression hearing is presumptively open for the benefit of the accused under the sixth amendment's public trial guarantee. *Waller*, 104 S. Ct. at 2215-16.

The inroads made by *Press-Enterprise* and *Waller* on the historic cloture of pretrial proceedings have been nar-

row and specific. Consequently, they are not precedent for a broad and sweeping rule of access to pretrial proceeding. *See Midland Publishing Co. v. District Court Judge*, No. 68862 slip op. (Mich, Jan. 9, 1985), *aff'g* 317 N.W.2d 284 (Mich. Ct. App. 1982) (public has no constitutional right to attend preliminary hearings) (reported in National Law Journal, Jan. 28, 1985, at 6, col. 4).[7]

Moreover, *Waller* and *Press-Enterprise* contain no suggestion of applicability to proceedings which take place before any criminal charge has been issued. The hearing to which access is sought in the instant case is such a precharge proceeding; it is an inquiry into an incident of alleged criminal behavior, a decision-making hearing roughly analogous to a John Doe or grand jury proceeding.

There seems to be no question but that grand jury proceedings may be conducted in secret, *see Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Levine v. United States*, 362 U.S. 610, 617 (1960), and that John Doe proceedings may similarly be held in secret. *Wisconsin Family Counseling Services v. State*, 95 Wis. 2d 670, 676-78, 291 N.W. 2d 631, 635-36 (Ct.App. 1980). The petitioners have cited no case holding that the public has a constitutional right of access to preaccusation criminal investigatory proceedings, and we are unpersuaded by their arguments that we should recognize such a right in this case.

The petitioners argue that extending first amendment access rights to the precomplaint hearing will enable the public to judge whether the hearing is fairly conducted and whether such a procedure should be retained, modified, or eliminated. The public's right to know, however, must sometimes defer to the effective investigation of crime. *Family Counseling*, 95 Wis. 2d at 673-74 & n.3, 291 N.W.2d at 634. Not every category of data in the criminal justice system is accessible to the public.

> [A]ccess to sealed court documents, to plea bargaining sessions, to prisons, to information within the government's control, and to the decision-making proc-

> esses within government offices and agencies, *e.g.*, the district attorney's office, probation departments, and parole boards, would substantially enhance public discussion and knowledge of the criminal justice system. Nevertheless, traditionally none of these areas has been open to the public, nor are they likely to be made so in the future.

Application of Herald, 734 F.2d at 104 (MacMahon, J., dissenting).

The Supreme Court in *Richmond Newspapers* and *Press-Enterprise* rested its recognition of a first amendment right of access on centuries-old traditions of openness in criminal trials and in the selection of juries. In the absence of any such tradition of openness in preaccusation proceedings, *cf. Gannett*, 443 U.S. at 387-90 (re pretrial proceedings generally), we are reluctant to recognize a first amendment right of access to those proceedings. In summary, because there is no textual, historic or common law decision and no historical tradition supporting the petitioners' claims, we reject the petitioners' assertion that the public has a constitutional right to attend the precomplaint hearing. We hold that there is no public right of access to the hearing under either the first or fourteenth amendments to the United States Constitution or art. 1, sec. 3 of the Wisconsin Constitution.

4. *Misuse of Discretion*

The petitioners contend that Judge Connors misused her discretion by closing the hearing. They argue that the reasons given by Judge Connors were insufficient to support cloture of the hearing and that her findings of fact were clearly erroneous. They also argue that cloture of a trial can be justified only by a compelling reason and that cloture must be "strictly and inescapably necessary." They assert that the reasons for cloture given by Judge Connors were insufficient to meet these strict standards.

The petitioners' argument assumes that a sec. 968.02(3), Stats., hearing constitutes a "sitting of a court," but we

have concluded that the hearing is not a "sitting of a court." The strict standards suggested by the petitioners are intended to apply to the cloture of trials and other postcomplaint "sittings of a court;" they do not apply to a precomplaint hearing before a judge. Therefore, the above standards, which balance the presumption of openness against the interests of the parties, are inapplicable. We therefore reject the petitioners' argument.

In her decision, Judge Connors gave the following reasons for closing the hearing: the testimony will be salacious, obscene and offensive to the public; the witnesses may be inhibited by the presence of spectators and the press; the psychological pressure brought to bear on the complainant; hardship to the accused and their families; and the effect of pretrial publicity on the right to a fair trial should a complaint be issued.

As noted earlier, the public's right of access to judicial proceedings is not absolute. *Globe Newspaper*, 457 U.S. at 606. In appropriate circumstances, a court has the inherent power to exclude the public from otherwise open proceedings if the administration of justice so requires. *Ampco Metal*, 273 Wis. at 536, 78 N.W.2d at 925. Such inherent power is not dependent upon the judge discharging the function of a court. *See Family Counseling*, 95 Wis. 2d at 675-76, 291 N.W.2d at 635. A judge's inherent power to close such a proceeding is discretionary. A discretionary act must be the product of a rational mental process by which the facts of the record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. *Jasper v. Jasper*, 107 Wis. 2d 59, 64, 318 N.W.2d 792, 795 (1982). We shall not find a misuse of discretion unless we find either that discretion was not exercised or there was an unreasonable basis for the trial court's decision. *Wisconsin Public Service Corp. v. Krist*, 104 Wis. 2d 381, 395, 311 N.W.2d 624, 631 (1981).

In deciding whether a sec. 968.02(3), Stats., hearing should be open or closed, a judge must consider the potential for harm because, in most cases, tangible harm will

not be apparent until the hearing is held. A judge ought consider whether there is a reasonable possibility that an open hearing would result in prejudice to witnesses, the complainant or the accused in deciding whether the hearing should be open or closed.

Applying the above principles, we conclude that Judge Connors did not misuse her discretion in closing the hearing. Among other things, the judge considered the psychological damage to the alleged victim from an open hearing, the possible inhibition of witnesses by the presence of spectators and the press, additional damage to the reputations of the accused,[8] and the effect of pretrial publicity on a future trial should a complaint be issued. We hold that the reasons given by the trial court provided abundant justification for the closure of the hearing.

In summary of our decision, we hold that: (1) no presumption of openness attaches to a precomplaint hearing under sec. 968.02(3), Stats.; (2) sec. 757.14, Stats., does not require that a sec. 968.02(3) precomplaint hearing be open to the public; (3) the free speech and free press clauses of the United States and Wisconsin Constitutions do not grant the public a right of access to a sec. 968.02(3) hearing; and (4) the trial judge did not misuse her discretion by closing the hearing in this case. The petitions for alternative writs of mandamus and prohibition are denied.

By the Court.—Appeals dismissed. Petition for alternative writ of mandamus denied. Petitions for alternative writ of prohibition denied. The order of this court staying the proceedings below is hereby vacated.

Recommendation: Recommended for publication in the official reports.

APPENDIX

[1] The petitioners withdrew their appeals at oral argument on the petition for a supervisory writ, conceding that they could not appeal from Judge Connor's order because they were not parties to the proceeding below. The petitioners' appeals are dismissed.

Mandamus also is improper in this case. Mandamus is appropriate to compel a trial court to take a specific action, but only if the duty of the trial court is clear. *Gross v. Midwest Speedways, Inc.*, 81 Wis. 2d 129, 135-36, 260 N.W.2d 36, 39 (1977). Mandamus is not available when the action sought to be compelled is discretionary. *State ex rel. Althouse v. Madison*, 79 Wis. 2d 97, 106, 255 N.W.2d 449, 453 (1977). We hold below that the decision to open or close the sec. 968.02(3) hearing is within the discretion of the trial judge. The petition for a writ of mandamus therefore is denied.

We conclude that a petition for a writ of prohibition is a proper method of obtaining review of the order closing the hearing. Prohibition is a proper means of correcting trial court error when an appeal will come too late for effective redress or where there is a need for intervention to avoid complete denial of a litigant's rights. *State ex rel. Arnold v. County Court*, 51 Wis. 2d 434, 437, 187 N.W.2d 354, 356 (1971). Here, the hearing could have been completed before petitioners obtained permission to intervene so that they could appeal from the closure order.

[2] A judge under sec. 968.02(3), Stats., is a judge with powers inherent in the judicial office. As such he or she may administer an oath under sec. 887.01(1), Stats., and issue subpoenas under sec. 885.01, Stats.

[3] *Black's Law Dictionary* 1519 (rev. 4th ed. 1968) defines "secret" as follows: "Concealed; hidden; not made public; particularly, in law, kept from the knowledge or notice of persons liable to be affected by the act, transaction, deed, or other thing spoken of."

[4] A minore ad majorus: If under proper circumstances cloture *may* be granted in a "sitting of the court," all the more so may it be granted in a proceeding administered by "a judge."

[5] Renumbered as sec. 972.08(1), Stats. *See* sec. 82, ch. 392, Laws of 1969; sec. 63, ch. 255, Laws 1969; sec. 2, ch. 66, Laws of 1965.

[6] Renumbered as sec. 757.14, Stats. *See* ch. 187, Laws of 1977.

[7] The California Supreme Court has also held that the public has no constitutional right to attend preliminary hearings. *San Jose Mercury-News v. Municipal Court*, 638 P.2d 655 (Cal. 1982) (en banc).

[8] The petitioners argue that the putative defendants' reputation interest warrants little consideration because K.M. could simply start a civil action, which would be open to the public, and therein say all that she will say in the precomplaint hearing. This argument overlooks the difference in the public perception of criminal as opposed to civil proceedings and the fact that K.M. is attempting to commence a criminal case.

APPENDIX 4

STATE OF WISCONSIN
CIRCUIT COURT : MILWAUKEE COUNTY
CRIMINAL DIVISION

In Re Petition of:

K.M.

For an Order Pursuant to §968.02(3), Wisconsin Statutes

January 17, 1985 Before the HON. ARLENE D. CONNORS, Circuit Court Judge, presiding.

APPEARANCES:

DANIEL KONDOS and MICHAEL POLLACK, Attorneys at Law, appeared on behalf of the petitioner.

MICHAEL MALMSTADT, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

WILLIAM COFFEY, Attorney at Law, appeared on behalf of un-named defendant.

STEPHEN GLYNN, Attorney at Law, appeared on behalf of un-named defendant.

ROBERT CHRISTENSEN, Attorney at Law, appeared on behalf of Milwaukee Sentinel, Milwaukee Journal, WTMJ, Inc., and Green Bay Press Gazette.

RALPH WEBER, Attorney at Law, appeared on behalf of WISN.

TRANSCRIPT OF PROCEEDINGS
(Judge Connors' Decision)

THE COURT: All right. The statute involved in this case, Section 757.14 provides as follows that:

"The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examinations of persons charged with crime; provided, that when in any court a cause of scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the court is sitting all minors not necessarily present as parties or witnesses."

Except for a very few statutory and other exceptions, sittings of the court in Wisconsin are public and all citizens including reporters may attend these sittings pursuant to the section just quoted, Wisconsin Statute 757.14. Findings justifying closure must be made by the court. And that cite for that is *State ex rel LaCrosse Tribune v. Circuit Court*, 115 Wis 2d, 220, (1983).

The term "sitting of the court" is a broad term, which is interpreted in accordance with the clear and express legislative policy that courts are to be open to all people. The fact that the court sits in the judge's chambers rather than in the courtroom is irrelevant as to whether or not it constitutes a sitting of the court.

At issue in this matter is whether pursuant to Wisconsin Statutes Section 968.02(3) the judge in determining probable cause is sitting as a court or is the judge in exercising the judicial authority granted by the statute sitting in the role of a probable cause magistrate for the purpose of deciding whether a complaint shall issue and that, in fact, the hearing in essence is not a sitting of the court.

A close reading of the statute says if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing, the statute does not say if the court finds probable cause.

It is the opinion of this court that the hearing involved is in the accusatory stage. There has been no formal complaint filed. The commencement of criminal proceedings initiate with the filing of a complaint pursuant to Wisconsin Statutes Section 967.05(1)(a) and as such, matters following the filing of said complaint involving court activity are therefore a sitting of the court.

It is the opinion of this court that Section 757.14 applies to sittings of the court be it civil or criminal after the initial petition or complaint commencing such petition—proceedings be filed or issued. As such, since this matter is in the accusatory stage, no complaint having been issued, not even any criminal case number filed, this case is presently under a miscellaneous number, these proceedings are exempt from the provisions of Section 757.14.

Even for the sake of argument that this court takes the position that said hearing under Section 968.02(3) is a sitting of the court, it is clear that while Section 757.14 provides that all sittings of the court are to be public presumptively mandates open sittings of the court, a trial judge may under proper and compelling circumstances close the courtroom to the public in the interest of justice. The judge has discretion to close the court as cited in the case of *Bloomer v. Bloomer*, 197 Wis, 140, (1929). It involved a closed hearing in a divorce case because of salacious evidence. The judge held the hearing in chambers to prevent disclosure of said salacious evidence to people in the courtroom.

In the exercise of the inherent power of a court, there can be limitations on the admission of the public to a courtroom. However, circumstances must be compelling for a court to exercise its discretion and close a courtroom.

In the hearing, pursuant to Wisconsin Statutes Section 968.02(3), an accusation has been made that a sexual assault occurred. The subject matter or testimony to be given will be salacious. It will be detailed testimony covering intimate facts and acts. There will be a statement by the complainant and other witnesses concerning those events.

In eliciting testimony from any complainant or victim of a sexual assault, the court is aware of the traumatic effect that this has on a victim. It is an embarrassing and sensitive area of testimony. The psychological effect on a victim can be devastating.

The main function of the judge is to ascertain the truth. To hold an open hearing would, in this court's opinion, impede the gathering of all relevant facts. The pressure of the public, press and cameras in the courtroom would, in the opinion of the court, intimidate witnesses.

The complainant in this matter is 18 years of age. She has asked for an open hearing. It is the court's belief that at this juncture she really doesn't realize the traumatic effect that an open hearing would have on her testimony. She would be in open court in the presence of all seated in that court, in the presence of strangers, some receptive, some not, some concerned, some merely curious, some contemptuous, even hostile to her position. It is a charged atmosphere. And it is this court's opinion that she should not be subjected to such an ordeal at this time. It is a concern not only for her but for her family as well.

This court has an obligation to protect equally all parties in this matter. As said initially, this is an accusatory hearing. The accused are presumed innocent until proven guilty. Again, the salacious, obscene testimony that will be presented in detail will have an impact on the lives of all parties concerned.

The end result of the probable cause hearing will either be:

1. No charges issued—The result being that the accused and their families will suffer a damaged reputation even though no charges are issued. The stigma of the testimony that is given in an open hearing will follow them and their families for the rest of their lives. It should be specifically noted that at this time they are only accused not charged with a sexual assault. And as this court has indicated previously regarding its concern for the complainant and for her family, this court equally has a concern for the ac-

cused and their families. A revelation of the intimate details of the facts surrounding these circumstances will cause them as well as the family of the complainant unnecessary agony or suffering if that revelation is at this time.

2. If the charges are issued—Then the accused, based on the testimony that has been given and the inordinate degree of pretrial publicity, will have a difficult time indeed to get an impartial jury that has not been exposed to the testimony that will be given. This court believes that it has an affirmative constitutional duty to minimize the effect of pretrial publicity in order to safeguard a defendant's due process at this time. And the court will cite: *Gannett v. DePasquale*, 443, U.S., 368, (1979). In doing this, the court balances the defendant's due process rights to a fair and impartial trial against the societal interest in open proceedings.

Based upon the above rational, this court will find:

1. That the probable cause hearing is not a sitting of the court and that Section 757.14 does not apply.

2. That the court may, in its discretion, grant closure if there are compelling reasons to do so even if it is sitting as a court.

3. That the matter is a sexual assault hearing and that the detailed testimony given will be salacious and obscene in nature and said testimony may be offensive to the public and should not be presented at an open hearing at this time.

4. That the objective of the court is searching for all the facts, and the truth of the facts would be impeded by having the public, press and cameras present and that the witnesses may be hesitant or embarrassed or intimidated so that all facts would not be revealed.

5. That the complainant would testify in surroundings that would exert psychological pressure that would be devastating not only to her but to her family as well.

6. That it would be an extreme hardship to the accused and their families to make public all details since there is no assurance that these charges will merit the issuance of a complaint. But above all and most of all, in the event a complaint is authorized, the degree of pretrial publicity that this matter has received would indicate that if the hearing is open, it would severely damage the rights of an accused to have a fair and impartial jury to decide the case.

For all of the above reasons, and there being no reasonable alternative available, this court will grant closure.

It is also to be noted that although this court will be closing the testimony to the public, any decision this court makes on this matter, including the rational for the decision, will be given in open hearing.

MR. CHRISTENSEN: Your Honor, may we ask that the proceeding be stayed to permit—evaluate whether to bring a writ or other appropriate requests for release from the Court of Appeals?

THE COURT: I'm going to deny that, Mr. Christensen. I'm sure—the hearing is scheduled to start tomorrow at 8:30. I'm sure that you can move effectively to obtain such a writ before the Court of Appeals should you desire to do so. And this court would obey any order from the Court of Appeals in that regard.

MR. CHRISTENSEN: Thank you, Your Honor.

MR. GLYNN: Thank you, judge.

(End of proceedings.)

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, Donna J. Hindin, Official Court Reporter, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place.

Dated at Milwaukee, Wisconsin
this 18th day of January, 1985.

/s/ DONNA J. HINDIN
Donna J. Hindin, Court Reporter

STATE OF WISCONSIN
CIRCUIT COURT : MILWAUKEE COUNTY

In re Petition K.M. Case No. L-0002-C

ORDER

For the reasons stated from the bench today, the proceedings in this matter on January 18, 1985 will be closed.

Dated this 17th day of January, 1985.

/s/ ARLENE D. CONNORS
Circuit Court Judge

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-903

(2)

In The
Supreme Court of the United States
October Term, 1985

CERTAIN UNNAMED PROSPECTIVE DEFENDANTS,

Petitioners,

vs.

NEWSPAPERS, INC.; WTMJ, INC.; GREEN BAY PRESS GAZETTE; WISN-TV, Division of the Hearst Corporation; WISN RADIO and WBTT RADIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the guarantee of the right to trial by an impartial jury, subsumed within the Fourteenth Amendment's Due Process Clause, require a state to close a hearing on a petition for issuance of criminal charges absent any showing that the protections afforded by measures such as voir dire and jury selection will be insufficient to assure prospective defendants a fair trial?

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JURISDICTION

The Court lacks jurisdiction over this case since the decision of the Wisconsin Supreme Court sought to be reviewed is not a final judgment or decree under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistence of Counsel for his defence.

United States Constitution Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes Section 757.14 (1983)

> The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with crime; provided, that when in any court a cause of a scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the Court is sitting all minors not necessarily present as parties or witnesses.

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, Respondents' statement of the case will be limited to the correction of omissions from the statement of Petitioners.

During the January 17, 1985 hearing on the motion to determine whether any proceedings on the petition for issuance of a criminal complaint would be open to the public, the Petitioners made no showing of any kind that the usual protective measures available to insure the impartiality of the jury impaneled in a criminal case would be insufficient to protect against any prejudicial publicity that might arise from public and news media attendance at such proceedings. In addition, Wisconsin Circuit Court Judge Arlene D. Connors made no findings in support of her decision to close the proceedings that such alternative measures would be insufficient to protect the Petitioners' rights to a fair trial.

SUMMARY OF ARGUMENT

The decision of the Wisconsin Supreme Court which Petitioners seek to have reviewed is not a final judgment or decree within the meaning of 28 U.S.C. § 1257 because the federal question involved will likely be the subject of further proceedings in the state courts, and its consideration by this Court now would be likely to result in piecemeal review.

The Petition for Writ of Certiorari should be denied because the only federal question raised: namely, whether the right of a criminal defendant to be tried by an im-

partial jury requires limitations on public access to judicial proceedings even where alternatives to such limitations may be sufficient to assure an impartial jury, has already been settled by this Court and the other questions upon which Petitioners seek review are not properly presented by this record.

ARGUMENT

I. This Court Lacks Jurisdiction To Grant The Writ Since The Opinion Of The Wisconsin Supreme Court Is Not A Final Judgment Or Decree Under 28 U.S.C. § 1257.

Petitioners assert jurisdiction under 28 U.S.C. § 1257 (3). That statute limits this Court's jurisdiction to review of state court decisions constituting "a final judgment or decree" rendered by the highest court of the state in question. 28 U.S.C.A. § 1257 (1966). The final judgment rule of § 1257 has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State Court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In the context of criminal proceedings, the final judgment is normally the imposition of the sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). Here, there has not only been no sentence imposed, but the state trial court has not even determined whether a criminal complaint will be filed.

Although the Wisconsin Supreme Court passed on the federal question of whether the Petitioners' rights to an impartial jury require closure of the hearing under section 968.02(3) of the Wisconsin Statutes based upon the record before it, the ultimate determination, if any, of this issue will have to await a trial and verdict on the criminal accusations still pending before the Wisconsin circuit court. Thus, assertion of this Court's jurisdiction at this stage of the proceedings would result in piecemeal review, the very evil at which the final judgment rule is aimed. *See Flynt v. Ohio*, 451 U.S. at 621.

II. The Writ Should Be Denied Because The Only Federal Question Resolved By The Wisconsin Supreme Court Is One That Has Already Been Settled By This Court.

The only federal issue addressed by the Wisconsin Supreme Court in its decision below was whether the rights of Petitioners to trial by an impartial jury justified closure of the proceedings on the petition for issuance of a criminal complaint based upon the record compiled before the circuit court judge. *State ex rel. Newspapers, Inc. v. Circuit Court*, 124 Wis. 2d 499, 511-12, 370 N.W.2d 209, 215-16 (1985). The court did not resolve any question involving the first amendment, but held only that the hearing on the petition to issue a criminal complaint was presumptively open to the public as a matter of Wisconsin law. *Id.* at 505-07, 370 N.W.2d at 213-14. In applying the so-called "compelling necessity" standard to the case, the court relied exclusively on its own prior decisions concerning openness of government proceedings and records in Wisconsin. *See id.* at 507, 370 N.W.2d at 214.

The issue of whether an open proceeding would violate the prospective defendants' rights to an impartial jury, while discussed by the Wisconsin Supreme Court, was not, and could not be, conclusively resolved by that court. While recognizing that a legitimate fear that substantial publicity would hinder efforts to provide a fair trial might conceivably justify closure, *id.* at 508, 370 N.W.2d at 214, the court held that "the potential threat to a fair trial arising out of an open section 968.02(3) hearing in this instance was much too speculative to justify closure." *Id.* at 511, 370 N.W.2d at 216. The court noted the alternative protections afforded by voir dire, change of venue, instructions and admonishments to the jury and the like, as well as the ultimate remedy of setting aside a verdict because of prejudicial publicity, and held that the potential threat to a fair trial "in this case under these circumstances does not in itself compel a closed hearing." *Id.* at 511-12, 370 N.W.2d at 215-16.

The Wisconsin court's analysis of the constitutional fair trial guarantee as a limitation on public access to judicial proceedings is squarely in line with this Court's prior pronouncements on this subject. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court noted that:

> [P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." . . . Appellate evaluations as to the impact of publicity

> take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

427 U.S. at 565 (citations omitted). The Court has repeatedly declared that an assessment of the efficacy of alternative protective measures is required whenever closure of a judicial proceeding is sought as a means of preserving other interests; *see, e.g., Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 2216 (1984); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 511 (1984); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580-81 (1980); and has eschewed reading the constitutional guarantee of an impartial jury as an absolute bar to certain forms of publicity. *See Chandler v. Florida,* 449 U.S. 560, 575 (1981).

The Wisconsin Supreme Court has interpreted section 968.02(3) of that state's statutes as providing for a presumptively open judicial proceeding subject to closure only upon a compelling showing that overriding public values, such as a defendant's interest in trial by an impartial jury, will be subverted by a public proceeding. This Court is bound by Wisconsin's construction of its statute. *See Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). Only if the record in this case demonstrates that the application of the Wisconsin statute has deprived the Petitioners of rights secured by the federal constitution can this Court grant Petitioners any relief. Since the Court has consistently interpreted the constitutional guarantee of the right to an impartial jury as requiring limitations on public access to judicial proceedings only where no alternatives would suffice to protect this interest, the record in

this case demonstrates that review by this Court is inappropriate.

Petitioners' contention that this case would make "an ideal companion case" to *Press-Enterprise Co. v. Superior Court,* No. 84-1560, is without merit. The questions presented in the *Press-Enterprise* case are whether the first amendment right of access to criminal proceedings extends to preliminary hearings and whether the California statute governing closure of preliminary hearings violates that amendment. Since the instant case presents no first amendment issue at all, it clearly is not a proper companion for *Press-Enterprise.*

CONCLUSION

The Court lacks jurisdiction under 28 U.S.C. § 1257 to review the Wisconsin Supreme Court's decision of an interlocutory appeal. Even if such jurisdiction exists, the

Court should deny the Petition for Writ of Certiorari since it presents no new federal question for resolution by the Court.

Certiorari should be denied.

Dated December 18, 1985.

Respectfully submitted,

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